IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.950 OF 2006

Yashpal Sahni, residing at 603, Odyssey-1, Hirnandani Gardens Powai, Mumbai - 400 076. ..Petitioner.

V/s.

1. Rekha Hajarnavis, Assistant Commissioner of Income-tax, 26(2), Mumbai, having her office at Smt.K.G.Mittal Charni Road, Mumbai-400 002.

2. K.C.Meena, Tax Recovery Officer, Range 26(2), Mumbai, having office at Room No.711, 7th floor, Smt.K.G.Mittal Bldg., Charni Road, Mumbai - 400 002.

3. Tarkeshwar Singh, Commissioner of Income-tax-26, Mumbai, having office at Smt.K.G.Mittal Bldg., Charni Road, Mumbai - 400 002.

4. K.M.Verma, Commissioner of Income-tax, TDS having his Office R. No.900B, 9th Floor, Smt.K.G.Mittal Bldg., Charni Road, Mumbai - 400 002.

5. The Union of India through the Secretary, Ministry of Finance, North Block, New Delhi-110 001.

6. Lan Eseda Industries Ltd., a Company incorporated under the provisions of the Companies Act 1956 and having its registered office at 201, Second Floor, Babukhan Estate, Basheerbaug, Hyderabad - 500 001. ..Respondents.

CORAM : F.I.REBELLO AND
J.P.DEVADHAR, JJ.

DATED : 18TH JULY, 2007.

JUDGMENT (PER J.P.DEVADHAR, J.)

1. A short but interesting question raised in this petition is, where a company deducts tax at source ('TDS' for short) from the salary payable to an employee, but fails to deposit the said amount into the Government treasury, whether, the revenue can recover the TDS amount with interest from the concerned employee in spite of the express bar contained in section 205 of the Income Tax Act, 1961 ?

2. The relevant facts are that on 28th March, 1996 the respondent No.6 Company appointed the petitioner as "Managing Director-Information Technology" with effect from 1/4/1996 on a basic salary of Rs.1,20,000/- plus other permissible benefits.

3. During the period from April to December, 1996 the respondent No.6 paid salary to the petitioner after deducting TDS totalling to Rs.6,66,000/-. Thereafter, disputes arose between the parties and ultimately the respondent No.6 terminated the services of the petitioner in March, 1997.

4. On 30th September, 1997 the petitioner

filed return of income for A.Y. 1997-98 inter alia claiming credit of TDS amounting to Rs.6,66,000/-.

5. The return of income was processed and on 29th March, 2000 the assessing officer issued an intimation under section 143(1) (a) of the of the Income Tax Act, 1961 ('the Act' for short) denying credit of the TDS amount of Rs.6,66,000/- and after imposing interest under section 234A, 234B and 234C of the Act raised a demand of Rs.12,73,940/-.

6. The petitioner made an application under section 154 of the Act on 6/4/2000 seeking rectification of the intimation issued under section 143(1)(a) of the Act inter alia on the ground that the credit of the TDS amount of Rs.6,66,000/- cannot be denied to the petitioner and in any event the TDS amount with interest cannot be recovered from the petitioner in view of the bar contained in section 205 of the Act. However, no order was passed on the said application. The petitioner addressed several letters to various authorities including a letter addressed to the Income Tax Officer, TDS Circle, Hyderabad calling upon them to initiate necessary action against the employer-respondent No.6 so as to recover the TDS amount collected and to compel the respondent No.6 to

issue TDS certificate in favour of the petitioner.

7. Instead of recovering the TDS amount with interest from the respondent No.6, the income tax authorities, in furtherance of the intimation issued under section 143(1) (a) of the Act initiated penalty proceedings against the petitioner under section 221(1) of the Act and by attaching the bank account of the petitioner recovered a sum of Rs.17,89,587/- from the petitioner. Challenging the above action, the present petition is filed.

8. Mr.Jasani, learned advocate appearing on behalf of the petitioner submitted that under the Act, once an employer responsible to deduct the tax at source has deducted the amount of tax from the salary, then under section 205 of the Act, the employee - assessee cannot be called upon to pay tax himself to the extent to which tax has been deducted. He submitted that in the present case, it is not in dispute that the employer - respondent No.6 has deducted tax at source from the salary paid to the petitioner. Having deducted tax at source, the respondent No.6 was bound and liable to deposit the said amount into the Government treasury within the stipulated time and also issue TDS certificate to the

petitioner so as to enable the petitioner to take credit of the said amount. He submits that the fact that the respondent No.6 has neither filed return of income for AY 1997-98 nor deposited the amount of tax deducted at source, cannot be a ground to recover the said TDS amount once again from the petitioner.

9. Mr.Jasani further submitted that under the Act the person deducting tax at source is required to deposit the TDS amount into the Government Treasury within the stipulated time and if he fails to do so, then, under section 201 of the Act, such person is deemed to be an assessee in default and such a person becomes liable to pay the TDS amount with interest @ 12% p.a. and till the TDS amount with interest is recovered, a charge is created upon all assets of such person. Moreover, penalty can be imposed upon such person under section 221 of the Act and he is liable for punishment under section 276 B of the Act for a term not less than three months. Accordingly, Mr.Jasani submitted that under the Act, tax deducted at source has to be recovered from the person who has deducted tax and the same cannot be recovered from the employee-assessee in view of the specific bar contained in section 205 of the Act.

10. Relying upon a decision of the Gauhati High Court in the case of **Assistant Commissioner of Income-tax & Ors. V/s. Om Prakash Gattani** reported in **242 I.T.R. 638** and a decision of the Karnataka High Court in the case of **Smt. Anusuya Alva V/s. Deputy Commissioner of Income Tax & Ors.** reported in **278 I.T.R. 206**, Mr.Jasani submitted that the petitioner may not be entitled to the credit of the TDS amount for want of TDS certificate, but the said amount cannot be recovered from the petitioner as per section 205 of the Act. Accordingly, Mr.Jasani submitted that the Income Tax authorities be directed to refund the amount of Rs.17,89,587/- which was illegally collected from the petitioner with interest at such rate as the Court deems fit and proper.

11. Mr.Ashokan, learned counsel appearing on behalf of the revenue submitted that in the present case, it is not in dispute that the tax allegedly deducted at source has neither been paid to the Central Government nor any Form No.16 is issued by the employer - respondent No.6 evidencing deduction of tax at source. Therefore, the responsibility of providing sufficient proof as to the payment of tax and discharge of the tax liability was exclusively upon the petitioner.

12. Referring to section 199 of the Act, Mr. Ashokan submitted that credit of the tax deducted at source can be given on production of certificate issued under section 203 of the Act. In the present case, in the absence of the TDS certificate in Form No.16 furnished by the petitioner, the income tax authorities were justified in rejecting the claim for credit of TDS amount and recover the same with interest from the petitioner.

13. Mr.Ashokan further submitted that in the present case, on investigation it is found that the respondent No.6 Company has not filed its return of income after AY 1994-95. He submitted that on the basis of the annual report of the Company for the year 2000-01 filed in the office of the Registrar of Companies, the revenue authorities have made efforts to approach the directors of the respondent No.6 company and recover the TDS amount, but the same has failed. Mr.Ashokan submitted that in the peculiar facts and circumstances of the case, the action of the income tax authorities in recovering the of TDS amount with interest from the petitioner cannot be faulted.

14. We have carefully considered the rival

submissions.

15. Chapter XVII of the Income Tax Act, 1961 provides for collection and recovery of tax by two modes. They are (one) directly from the assessee and (two) indirectly by deduction of tax at source. In the present case, we are concerned with the second mode of recovery, namely recovery of tax by deduction at source.

16. Section 192 of the Act provides that any person responsible for paying any income chargeable under the head ‘salaries’ shall deduct, at the time of payment, income tax at the average rate of income computed on the basis of the rates in force for the financial year in which the payment is made. Under section 200 of the Act, the TDS amount collected under section 192 of the Act is required to be paid to the credit of the Central Government within the prescribed time.

17. Section 201 of the Act inter alia provides that where a company bound to deduct tax at source fails to deduct tax or after having deducted fails to pay the said tax to the credit of the Central Government within the stipulated time, then the company

shall be deemed to be an assessee in default in respect of the tax and the said company shall be liable to pay simple interest @ 12% p.a. on the TDS amount from the date on which such tax was deductible upto the date on which such tax is actually paid to the Central Government. Section 201(2) of the Act further provides that till the TDS amount with interest as stated above is paid to the Central Government, there shall be a charge upon all the assets of the company. Moreover, section 221 of the Act inter alia provides for the levy of penalty and section 276 B of the Act inter alia provides that where a person fails to pay to the credit of the Central Government, the tax deducted at source, such person shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and provides for levy of fine. Thus, the Act provides for complete machinery to recover tax deducted at source from the person who has deducted it.

18. At this stage, we may also note that every person deducting tax at source is required to issue a certificate under section 203 of the Act specifying the amount of tax deducted, the rate at which the tax has been deducted and such other particulars as may be prescribed. Section 199 of the Act provides that any

tax deducted at source under the provisions of Chapter XVII and paid to the Central Government shall be treated as payment of tax on behalf of the person from whose income the deduction was made and the credit shall be given to him for the amount so deducted on production of the TDS certificate issued under section 203 of the Act. Section 205 of the Act provides that where tax is deductible at the source under Chapter XVII of the Act, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted.

19. Section 205 of the Act as it stood at the relevant time reads thus :-

> " 205 - Bar against direct demand on assessee- Where tax is deductible at the source under sections 192 to 194, section 194A, section 194B, section 194BB, section 194C, section 194D, section 194E, section 195 and section 196A, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income. "

20. From the language of section 205, it is clear that once the tax is deducted at source, the same cannot be levied once again on the assessee who has suffered the deduction. Once it is established that the tax has been deducted at source from the salary of

the employee, the bar under section 205 of the Act comes into operation and it is immaterial as to whether the tax deducted at source has been paid to the Central Government or not, because elaborate provisions are made under the Act for recovery of tax deducted at source from the person who has deducted such tax.

21. In the present case, the petitioner - assessee has furnished monthly pay slips and bank statements to show that from his salary tax was deducted at source by the employer - respondent No.6. Authenticity of the said pay slips and bank statements have not been disputed by the revenue. Thus, it is clear that the tax has been deducted at source by the respondent No.6 from the salary paid to the petitioner. Therefore, the only question to be considered is, if the employer-respondent No.6 has failed to deposit the tax deducted at source from the salary income of the petitioner to the credit of the Central Government, whether the revenue can recover the TDS amount with interest once again from the petitioner ?

22. In the present case, though the respondent No.6 has deducted the tax at source from the salary income of the petitioner, the respondent No.6 has not issued the TDS certificate in Form No.16 to the

petitioner. As a result, the petitioner is not entitled to avail credit of the tax deducted at source. However, once it is established that the tax has been deducted at source, the bar under section 205 of the Act comes into operation and the revenue is barred from recovering the TDS amount once again from the employee from whose income, TDS amount has been deducted. It is pertinent to note that the purpose of issuing TDS certificate under section 203 of the Act is to enable the assessee to avail credit of the tax deducted at source in the relevant assessment year. If the TDS certificate is not issued, then under section 199 of the Act, the assessee from whose income, tax has been deducted at source will not be entitled to take credit of the said amount. In that event, on account of the non availability of the credit, the assessee would be liable to pay tax once again even though the tax was deducted at source. Thus, it would be a case of double taxation which is not permissible in law. To avoid such anomaly, section 205 has been enacted, to the effect that, once the tax is deducted at source by the employer-company, then, the person from whose income, the tax has been deducted at source shall not be called to pay the said tax again. From the language of section of 205 of the Act, it is clear that the bar operates as soon as it is established that the tax has

been deducted at source and it is wholly irrelevant as to whether the tax deducted at source is paid to the credit of Central Government or not and whether TDS certificate in Form No.16 has been issued or not. Also the mere fact that the employer may not issue TDS certificate to the employee does not mean that the liability of the employer ceases. The liabilty to pay income tax if deducted at source is upon the employer.

23. As held by the Gauhati High Court in the course of Omprakash Gattani (supra), once the mode of collecting tax by deduction at source is adopted, that mode alone is to be adopted for recovery of tax deducted at source. Although it is obligatory on the part of the person collecting tax at source to pay the said TDS amount to the credit of the Central Government within the stipulated time, if such person fails to pay the TDS amount within the stipulated time, then, section 201 of the Act provides that such person shall be deemed to be an assessee in default and the revenue will be entitled to recover the TDS amount with interest at 12% p.a. and till the said TDS amount with interest is recovered there shall be a charge on all the assets of such person or the company. Penalty under section 221 of the Act and rigorous imprisonment under section 276 B of the Act can also be imposed upon

such defaulting person or the company. Thus, complete machinery is provided under the Act for recovery of tax deducted at source from the person who has deducted such tax at source and the revenue is barred from recovering the TDS amount from the person from whose income, tax has been deducted at source. Therefore, the fact that the revenue is unable to recover the tax deducted at source from the person who has deducted such tax would not entitle the revenue to recover the said amount once again from the employee-assessee, in view of the specific bar contained in section 205 of the Act.

24. As stated earlier, in the present case the petitioner-assessee has established that from his salary income, tax has been deducted at source by the employer-respondent No.6 and, therefore, the revenue has to recover the said TDS amount with interest and penalty from the respondent No.6 alone and the revenue cannot seek to recover the said amount from the petitioner-assessee in view of the specific bar contained under section 205 of the Act. The fact that the petitioner is not entitled to the credit of the tax deducted at source for the non issuance of the TDS certificate by the respondent No.6, cannot be a ground to recover the amount of tax deducted at source from

the petitioner. In other words, even if the credit of the TDS amount is not available to the petitioner - assessee for want of TDS certificate, the fact that the tax has been deducted at source from salary income of the petitioner would be sufficient to hold that as per section 205 of the Act, the revenue cannot recover the TDS amount with interest from the petitioner once again.

25. In the result, the petition succeeds. As the respondent No.6 had deducted the tax at source from the salary income of the petitioner the revenue could not have recovered the said amount with interest from the petitioner in view of the bar contained in section 205 of the Act. Accordingly, the revenue is directed to refund to the petitioner within 8 weeks from today the amount of Rs.17,89,587/- with interest @ 6% from the date of recovery till the date of payment. Though the credit of the tax deducted at source is not available to the petitioner, since the said liability is not recoverable from the petitioner, the revenue is directed to earmark the said TDS liability as "not recoverable" from the petitioner.

26. Rule is made absolute in the above terms with no order as to costs.

(F.I.REBELLO, J.)

(J.P.DEVADHAR, J.)